(1)

Supreme Court, U.S.
FILED

FILE COPY

No. _____

94 1845 MAY 10 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BARBARA NORTON; GLORIA MCCLINTON; IDA LEE SMITH; CHARLES SOLOMON; LEWIS A. WARD JR.; GLENDA F. PATRICK; TERRY HUNTER; PAULETTE GADISON; MICAH SIMS; IDA NEAL; VIRGINIA SMALL; LEE ANDERSON; ROBERT ARORA; HERRMAN AUGUSTIN; RACHEL ANZALDUA; JAMES AUTRY; CHIKE J. OGBOENYIYA; CHARLES PACE; CHRISTINE VILLARREAL; NANETTE YELDER; LANG VAN BUI; VICTOR WHITE; KERMIT FISHER; ANDREW BEASLEY; ALFREDENE THOMAS; EDWARD FINISTER; ALICE HAYES; REGINALD JEFFERSON; PATSY LEE; DANDY HUNT; THOMAS WELLS, III; LONZO DORN; CORDELIA BELEHU; ALAN RICHARDSON; MARSHALL O'BRIEN; WAYNE HALLMAN; MARY MARTINEZ; SHELIA PHILLIPS; RENEE EDWARDS; LEO AARON, JR.; SYLVIA HERNANDEZ; ELIZABETH ARGUETA; SPENCER JACKSON; JIM BURNS, JR.; LEOLA CRAWFORD; WINSTON PINK; VICTOR SAMPLES; LINDA JOLIVET; LARRY WARD, GLORIA CASTILLO; ANTHONY GARCIA; SANTOS MARTINEZ; AND LINDA SCHWARTZ, Individually and on behalf of all others Similarly Situated,

Petitioners,

v.

HOUSTON INDUSTRIES, INCORPORATED; HOUSTON LIGHTING & POWER COMPANY; DON D. JORDAN; DON D. SYKORA; HUGH RICE KELLY; STEVE LETBETTER; ED TURNER; LEE HOGAN; JACK GREENWADE; DON HALL; L. CHAPMAN SMITH; SUSAN FABRE; STEPHEN SCHAEFFER; MCKINSEY & COMPANY, INC.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Of Counsel:
JULIUS J. LARRY, III
1834 Southmore Blvd.
Houston, Texas 77004
(713) 942-0320
(713) 942-0401 (FAX)

*Mark T. McDonald
2426 South Loop West Suite 370
Houston, Texas 77054
(713) 667-4141
(713) 667-8209 (FAX)
**Counsel of Record*
For Petitioners

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-981-9001

QUESTIONS PRESENTED FOR REVIEW

1. The Petitioners ("Employees") were employed by Respondent, Houston Lighting & Power Company, ("HL&P"), until HL&P had a reduction-in-force which commenced in April 1992. Respondents offered Petitioners various severance benefits in exchange for signing a release of all claims. The Employees attempted to revoke acceptance of the severance offers, to no avail. They instituted legal actions under the Age Discrimination in Employment Act ("ADEA"), Title VII, ERISA and state common law. The Employees did not return their severance benefits. Is the application of the state common law doctrine of ratification to the ADEA or Title VII precluded, as a matter of federal common law, by this Court's decision in *Hogue v. Southern Railway Company*, 390 U.S. 516 (1968)?

2. Respondents offered to pay 60 days pay to all Employees who were targeted for separation from HL&P, whether the Employees signed releases or not. The Employees who did not sign releases received the 60 days pay. The Petitioners received severance pay in exchange for signing releases, but did not receive the 60 days pay that was received by the Employees who did not sign releases. HL&P refused to pay Petitioners after demand was made to do so. Does HL&P owe 60 days pay to Petitioners?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are:

BARBARA NORTON; GLORIA MCCLINTON; IDA LEE SMITH; CHARLES SOLOMON; LEWIS A. WARD JR.; GLENDA F. PATRICK; TERRY HUNTER; PAULETTE GADISON; MICAH SIMS; IDA NEAL; VIRGINIA SMALL; LEE ANDERSON; ROBERT ARORA; HERRMAN AUGUSTIN; RACHEL ANZALDUA; JAMES AUTRY; CHIKE J. OGBOENYIYA; CHARLES PACE; CHRISTINE VILLAREAL; NANETTE YELDER; LANG VAN BUI; VICTOR WHITE; KERMIT FISHER; ANDREW BEASLEY; ALFREDENE THOMAS; EDWARD FINISTER; ALICE HAYES; REGINALD JEFFERSON; PATSY LEE; DANDY HUNT; THOMAS WELLS, III; LONZO DORN; CORDELIA BELEHU; ALAN RICHARDSON; MARSHALL O'BRIEN; WAYNE HALLMAN; MARY MARTINEZ; SHELIA PHILLIPS; RENEE EDWARDS; LEO AARON, JR.; SYLVIA HERNANDEZ; ELIZABETH ARGUETA; SPENCER JACKSON; JIM BURNS, JR.; LEOLA CRAWFORD; WINSTON PINK; VICTOR SAMPLES; LINDA JOLIVET; LARRY WARD, GLORIA CASTILLO; ANTHONY GARCIA; SANTOS MARTINEZ; AND LINDA SCHWARTZ, Individually and on behalf of all others Similarly Situated-Petitioners.

HOUSTON INDUSTRIES, INCORPORATED; HOUSTON LIGHTING & POWER COMPANY; DON D. JORDAN; DON D. SYKORA; HUGH RICE KELLY; STEVE LETBETTER; ED TURNER; LEE HOGAN; JACK GREENWADE; DON HALL; L. CHAPMAN SMITH; SUSAN FABRE; STEPHEN SCHAEFFER; MCKINSEY & COMPANY, INC., are the Respondents.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATUTES iv

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE v

STATEMENT OF THE CASE v

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW 1

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED 2

ARGUMENT 5

CONCLUSION 14

APPENDIX A 1a

APPENDIX B 3a

APPENDIX C 22a

APPENDIX D 25a

TABLE OF AUTHORITIES

Cases **page**

Charles Pace, et al. v. Houston Industries, Inc., et al., C.A. No. H-92-3442 (S.D. Tex.) v

Dice v. Akron, C & Y.R. Co., [342 U.S.359], 362 [72 S. Ct. 312, 314, 96 L.Ed. 396] 5

Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992), cert. denied,_____U.S._____, 113 S.Ct. 412, 121 L. Ed. 2d 336 (1992) 3

George v. Mobil Oil Corp., 739 F. Supp. 1577, (1990, SD NY) 9

Grillet v. Sears, 927 F.2d 217 (5th Cir. 1991) 3

Hogue v. Southern Railway Company, 390 U.S. 516 (1968) i

Houston Lighting & Power Co., et al. v. International Brotherhood of Electrical Workers, Local Union No. 66, C.A. No. H-92-0430 (S.D. Tex.) v

Isaacs v. Caterpillar, Inc., 765 F. Supp. 1359 (C.D.Ill. 1991) 3

Jones v. AT&T Co., 798 F. Supp. 1137, 1145 (E.D. Pa.) 13

Maria Fuentez, et al. v. Houston Industries, Inc., et al., C.A. No. H-92-2728 (S.D. Tex.) v

Needy v. Sparks, 393 N.E. 2d 1252 (Ill. Ct. App. 1979) 10

O'Shea v. Commercial Credit Corporation, 930 F.2d 358 (4th Cir. 1991) 5

Oberg v. Allied Van Lines, Inc., 11 F.3d 679 (7th Cir. 1993) 3

Oglesby v. Coca-Cola Bottling Co., (1985, ND, Ill) 620 F.Supp. 1336, 39 BNA FEP Cas 1004 7

Ott v. Midland - Ross Corp., 600 F.2d 24 (6th Cir. 1979) 7

Rachel Anzaldua, et al. v. McKinsey & Co, et al., C.A. No. 93-0400 (S.D. Tex.) v

Roper v. GTE Communication Systems Corp., (1986, ND Ill) No. 84 C 10898 8

Wamsley v. Champlin Refining and Chemicals, Inc., 11 F.3d 534 (5th Cir. 1993) 3

Williams v. Phillips Petroleum Company, 23 F.3d 930 (5th Cir. 1994) 3

STATUTES

28 U.S.C. §1331 2

28 U.S.C.§ 1254 (1) 2

29 U.S.C.§ 621 et sequitur v

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

This case involves the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.§ 621 et sequitur. Title VII of the Civil Rights Act of 1964, as amended, is involved.

STATEMENT OF THE CASE

Barbara Norton and the other similarly situated Employees brought several state and federal suits against their employer in connection with a reduction-in-force that commenced in April 1992. The *Norton* case asserted causes of action for breach of contract, conversion, fraud, misrepresentation, and intentional infliction of emotional distress under Texas law. *Rachel Anzaldua, et al. v. McKinsey & Co, et al.*, C.A. No. 93-0400 (S.D. Tex.) pleaded state claims for fraud in the inducement. The state court cases were removed to federal court on the basis of federal preemption. *Maria Fuentez, et al. v. Houston Industries, Inc., et al.*, C.A. No. H-92-2728 (S.D. Tex.) was a declaratory judgment suit alleging violation of the Worker Adjustment and Retraining Notification Act ("WARN"). *Charles Pace, et al. v. Houston Industries, Inc., et al.*, C.A. No. H-92-3442 (S.D. Tex.) alleged violations of the ADEA and ERISA. Houston Industries then brought suit against the Employees' collective bargaining representative in *Houston Lighting & Power Co., et al. v. International Brotherhood of Electrical Workers, Local Union No. 66*, C.A. No. H-92-0430 (S.D. Tex.).

Judge Kenneth Hoyt of the Southern District of Texas consolidated the *Norton*, *Pace*, *Anzaldua*, and *IBEW* suits into *Norton*, C.A. No. H-92-3239. The cases were consolidated for the purpose of determining the releases' validity and enforceability. The district court granted

summary judgment in the Employers' favor, finding that the Employees had knowingly and voluntarily executed the releases.

The Employees timely perfected an appeal to the Fifth Circuit Court of Appeals. Only the Employees in the consolidated *Norton* case who signed releases perfected the appeal.

The Employer offered the Employees various severance benefits in exchange for signing a release of all claims related to their employment with or separation from the Company. The releases did not mention that the Employees had at least 45 days to consider the release. HL&P issued an announcement to all of its employees that the company would provide separated employees compensation equal to 3 weeks of salary per year of service with a minimum of 12 weeks pay and a 52-week maximum. The first 60 days, separated employees would continue to be paid and receive benefits as if they were still employed. In order to receive severance pay, each employee had to sign a release and the release had to be received by the company within the required 45 days. Additionally, each separated employee would receive 60 days pay whether they signed a release or not. Many employees did not sign the release, while many attempted to revoke after signing. At least one employee revoked within a seven-day period. When the employees learned of the procedures utilized by the Company to terminate then, they sent letters of revocation of the severance offers and releases. Hearings were held by the Company wherein the Company refused to allow the employees to revoke the releases, even though they offered to give the Company a credit by offsetting the severance pay.

The district court did not consider the effect of the letters of revocation on the enforceability of the releases. The court held that the employees ratified the releases. The Fifth Circuit affirmed.

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BARBARA NORTON, et al,
Petitioners,
v.
HOUSTON INDUSTRIES, INCORPORATED, et al,
Respondents.

On Writ Of Certiorari To The Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice of the United States Supreme Court and the Associate Justices of the Supreme Court:

Barbara Norton, et. al, the Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit that was rendered on February 10, 1995.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW

The opinion of the Fifth Circuit Court of Appeals is not reported. It is reproduced in Appendix A. The Opinion of the United States District Court for the Southern District of Texas, Houston Division (Kenneth Hoyt, Judge) is not reported, but is reproduced in Appendix B.

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The final judgment of the Court of Appeals sought to be reviewed was entered on February 10, 1995. Petitioners were discouraged from filing a petition for rehearing or suggestion of rehearing en banc.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.§ 1254 (1).

This Petition for Writ of Certiorari is filed within 90 days of the entry of judgment by the Court of Appeals.

A. Basis for Federal Jurisdiction in the District Court

The district court had jurisdiction of this case pursuant to 28 U.S.C. §1331.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

1. Certiorari Should Be Granted to Resolve Conflicts in Principle Among the Circuits and Lower Courts.

2. Certiorari Should Be Granted Because the United States Court of Appeals for the Fifth Circuit Has Decided An Important Question of Federal Law in Conflict With the Jurisprudence of the Supreme Court. (*Hogue v. Southern R. Co.*, 390 U.S. 516 (1968)).

The "tender back/ratification" issue has produced numerous conflicts among the lower courts and the Circuits. The Seventh Circuit, in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), held that the employees had no duty to tender severance benefits back to their employer as a prerequisite to filing age discrimination claims, notwithstanding the employees' previously executed waiver of all claims. The Fifth Circuit held in *Grillet v. Sears*, 927 F.2d 217 (5th Cir. 1991); *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993); and *Williams v. Phillips Petroleum Company*, 23 F.3d 930 (5th Cir. 1994), that the employees ratified releases if they did not return their severance benefits prior to filing suit.

The Eleventh Circuit in *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), cert. denied, __U.S. _, 113 S.Ct. 412, 121 L. Ed. 2d 336 (1992), found that there was no ratification by the employees retaining the consideration they received from their employer, in an ADEA case. The courts in *Oberg*, *Forbus* and *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359 (C.D.Ill. 1991), relied upon the Supreme Court's decision in *Hogue v. Southern R. Co.*, 390 U.S. 516, 88 S.Ct. 1150, 20 L. Ed. 2d 73 (1968), which was a FELA case. The *Oberg* court first reviewed the cases relied upon by the court of appeals in *Grillet* and *O'Shea*. In declining to follow them, however, the *Oberg* court did not adopt the proffered distinction between void and voidable releases suggested by those decisions, but noted the reliance in those cases on state law ratification doctrines to hold releases enforceable even when challenged as not informed and voluntary under pre-OWBPA standards.

Referring to *O'Shea*, the *Oberg* court noted that the only pre-OWBPA requirement was that the release be knowing and voluntary, defined differently from Circuit to Circuit. It then noted the extent to which the OWBPA adds

significant additional requirements and imposes a heavy burden upon employers, and determined that such additional requirements precluded a ratification or tender-back argument as a matter of federal law, by preemption. Specifically, it stated:

> Had Congress not spoken, this court may have even been inclined to follow *Grillet* and *O'Shea*, and allow employees the freedom to ratify their severance agreements through general principles of contract law. However, Congress has occupied this area of the law through the enactment of the OWBPA. 11 F.3d at 683.

The opinion of the court of appeals in this case also merits review on the ground that it is inconsistent with the decision of this court in *Hogue v. Southern Railway Company*, 390 U.S. 516 (1968). *Hogue* was a suit under the Federal Employers Liability Act brought by an injured railroad employee. The employee had signed a release in exchange for $105.00. Later, he sued alleging that the release was void for mutual mistake of fact. He did not tender the consideration he had been paid for the release. Georgia courts held that (1) Georgia law applied, and (2) under that law, failure to tender constituted ratification, requiring the suit to be dismissed.

The Supreme Court reversed both holdings. It held that "the question whether a tender back of the consideration was a prerequisite to the bringing of the suit is to be determined by federal rather that state law". 390 U.S. at 517, 88 S. Ct. at 1151. Then the Court held:

> It is sufficient for the purposes of this decision to note that a rule which required a refund as a prerequisite to institution of suit would be "wholly incongruous with the general policy of the Act to give railroad employees a right

to recover just compensation for injuries negligently inflicted by their employers." *Dice v. Akron, C & Y.R. Co.*, [342 U.S.359], 362 [72 S. Ct. 312, 314, 96 L.Ed. 396]. Rather, it is more consistent with the objectives of the Act to hold, as we do, that it suffices that, except as the release may otherwise bar recovery, the sum paid shall be deducted from any award determined to be due to the injured employee. 390 U.S. at 518, 88 S.Ct. at 1152.

The Fourth Circuit, in *O'Shea v. Commercial Credit Corporation*, 930 F.2d 358 (4th Cir. 1991), did not mention the *Hogue* decision while finding ratification of a release because the employee did not tender back the severance benefits. The Fifth Circuit did not discuss the *Hogue* decision in *Grillet*. However, the Fifth Circuit attempted to distinguish *Hogue* in the *Wamsley* decision while criticizing the Seventh Circuit in *Oberg* and the Eleventh Circuit in *Forbus*, as having improperly analogized the FELA to the ADEA.

ARGUMENT

1. The Petitioners ("Employees") were employed by Respondent, Houston Lighting & Power Company, ("HL&P"), until HL&P had a reduction-in-force which commenced in April 1992. Respondents offered Petitioners various severance benefits in exchange for signing a release of all claims. The Employees attempted to revoke acceptance of the severance offers, to no avail. They instituted legal actions under the Age Discrimination in Employment Act ("ADEA"), Title VII, ERISA and state common law. The Employees did not return their severance benefits. Is the application of the state common law doctrine of ratification to the ADEA or Title VII precluded, as a matter of federal common law, by this Court's decision in *Hogue v. Southern Railway Company*, 390 U.S. 516 (1968)?

There is no requirement under the ADEA or Title VII that an employee who signed a release in exchange for severance benefits must first return the consideration before filing suit on causes of actions that were discovered after releases were signed. When the Petitioners learned of the misrepresentations and fraud by the Company, they immediately sent letters of revocation and affidavits supporting their letters of revocation. Appendix C. The Company held hearings wherein the Employees expressly revoked acceptance of the severance offer. The Company ultimately refused to allow the Employees to set aside revoke or rescind the releases, although the Employees attempted to revoke within a reasonable time. APPENDIX D.

This case differs from *Grillet*, *O'Shea*, *Oberg*, *Williams* and *Wamsley* in that the Employees in this case attempted to void the releases and credit the company by way of an offset of their severance pay. Although the district court found that the Employees ratified the release, the conduct of the Employees show that there was no ratification. The Company argued that the Employees had only seven (7) days in which to revoke their acceptance of the offer. However, the OWBPA states the period for revocation must be *at least* 7 days, thus suggesting that the revocation period could be longer than 7 days but not shorter than 7 days. Petitioners believe that the better-reasoned position should allow employees to revoke releases within a reasonable time after they discover grounds to avoid the release. In *Wamsley*, the Court held that when former employees signed waivers and chose to retain and not tender back to their employer the benefits paid them in consideration for their promise not to sue, they manifested their intention to be bound by the waivers and thus made a new promise to abide by their terms. The Court did not discuss the origin of this "new promise". The Petitioners believe that any new promise must be supported by new

consideration. But, in the case at bar, no ratification or new promise could have taken place in light of the employees' express revocation of the offer.

Furthermore, it would have been futile to tender severance pay to HL&P judging by the results of the revocation hearings that were held by the Company. Appendix D. Many employees signed releases under duress and without the actual benefit of counsel. *In Ott v. Midland - Ross Corp.*, 600 F.2d 24 (6th Cir. 1979), the Court expressed the view that a Plaintiff's claim that he was fraudulently induced to release his rights under the ADEA may be required to be submitted to a jury. The court ruled that an alleged release of rights under the ADEA executed by an employee at the time of his resignation did not bar, as a matter of law, his age discrimination action, because a material fact question remained as to whether he had signed the release under duress, in *Oglesby v. Coca-Cola Bottling Co.*, (1985, ND, Ill) 620 F.Supp. 1336, 39 BNA FEP Cas 1004. Allegedly, the employee had been called into his supervisor's office and given a choice of signing a statement accepting a severance program and resigning and releasing his claims, or "resisting" and having his employment terminated. There was virtually no discussion, and the employee signed, although he was allegedly so enraged that he "was at a complete blank," did not realize what he was doing and did not read the papers, but signed them only "to get out of there." He alleged lack of intent on the basis of duress, as the release had been presented on a "take it or leave it" basis without negotiation or opportunity for him to discuss it with an attorney. The release provided that, in exchange for the severance benefits, the employee released the company and all its owners, officers, and employees from any claim then, and in the future, with respect to employee benefits, insurance, salary, or any other claim related to employment. The court ruled that a factfinder

might rationally find the threat of being fired so traumatic as to amount to duress, especially for a managerial employee of middle age, vitiating the employee's contractual intent.

The facts and circumstances indicated that the plaintiff's signing of a purported ADEA release might have been involuntary, because of the *disadvantageous economic position* in which he had been placed as a consequence of being asked to sign the release as a condition of his continued receipt of severance pay, after he already left the defendant company's employ, and a question of fact remained as to this issue, precluding summary judgment for the company, the court held in *Roper v. GTE Communication Systems Corp.*, (1986, ND Ill) No. 84 C 10898. Following discussions about resignation, the plaintiff accepted a severance package including salary, vacation pay, and insurance coverage, and then resigned. A week later he was told to sign a statement that, in consideration of the promises made to him by the company, he released and forever discharged with prejudice the company from all actions, causes of action, suits, claims and demands whatsoever in law or in equity arising out of or in connection with his association or employment with it, including, but not limited to, ADEA claims. The statement added that the signer did so voluntarily, of his own free will, not under duress, and with full understanding of its terms and conditions; that if he failed to comply, the company would be released from its obligations; and that it constituted the entire agreement between the parties. The employee testified, however, that these terms had not been discussed earlier and were not a part of the oral agreement; that the company informed him that continuation of severance pay depended on his signing; that his attorney advised him that he would probably lose severance benefits unless he signed; that he had no other income or savings; and that he relied on the pay to support his family and pay bills. His subsequent bankruptcy filing

added credence to his claim of financial exigency, the court said. Declaring that courts would enforce only knowing and voluntary waivers of ADEA rights, the Court ruled that, while the plaintiff did not deny understanding the significance of the waiver, and although his experience in personnel and employee relations and his consultation with counsel indicated a knowing waiver, and although the document clearly released any ADEA action, there was evidence that he had signed it as a result of *economic duress*. As the threat of discharge from one's employment could constitute duress, so too a contract executed under the threat of losing severance benefits could be voidable, it declared.

In *George v. Mobil Oil Corp.*, 739 F. Supp. 1577, (1990, SD NY), the Court held that an issue of fact existed as to voluntariness of the release executed by a 62-year-old oil company planning executive after the decision was made to force his early retirement, after restructuring of operations. Although the release was clear and unambiguous in its terms (which certainly is not the case here), and the Plaintiff was a well-educated, sophisticated businessman, the terms were non-negotiable; no attorney was present when he signed the release, and no evidence clearly established that the release resulted in benefits to the Plaintiff to which he would not otherwise have been entitled under the company's severance and retirement policies.

In *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975), the Court, in holding that the employee's complaint was sufficient to state a claim for relief, stated that if the agreement not to prosecute was induced by fraud, it was voidable by the employee, and that the determination whether fraud had occurred was to be made under federal law. Reversing a summary judgment for the employer, the court stated that (1) at the very least, the jury could find that the agreement was the product of material misrepresentations

of fact by the employer's counsel, and (2) at worst, it could find that the employer's actions constituted fraud, it having entered into the agreement without intending to honor it for the purpose of frustrating the employee's intention to seek redress. Either construction of the evidence, the Court concluded, would suffice to estop the employer from asserting the agreement (which both parties agreed was intended as a release) in avoidance of the employee's claim.

The Court also indicated that federal courts may be required to try the issue of fraudulent inducement of a release to a jury. In addition, it decided that the jury should decide whether the employer's acts in securing the agreement affected a tolling or suspension of the statute of limitations.

Even if a tender-back requirement existed, genuine issues of material fact were raised regarding whether HL&P would have accepted tender. There is substantal evidence that the Employees sent letters of revocation, supported by affidavits. Hearings were held in which the Company concluded that it would not allow the Employees to revoke. By the Company's conduct, it is clear that the Company would not have accepted a proper tender in exchange for revocation of the releases. Authorities clearly establish that a party to a release is relieved of his obligation of tender "where it is reasonably clear that such would be a vain, idle, or useless act". *Needy v. Sparks*, 393 N.E. 2d 1252 (Ill. Ct. App. 1979). The "futility" exception would preclude summary judgment in this case even if there was a tender requirement for challenging the releases.

2. Respondents offered to pay 60 days pay to all Employees who were targeted for separation from HL&P, whether the Employees signed releases or not. The Employees who did not sign releases received the 60 days pay. The Petitioners received severance pay pursuant to

HL&P's formula, in exchange for signing releases, but did not receive the 60 days pay that was received by the Employees who did not sign releases. HL&P refused to pay Petitioners after numerous demands were made to do so. Does HL&P owe 60 days pay to Petitioners?

The respondents owe 60 days pay to the 940 former employees who signed releases. All severed employees were scheduled to receive 60 days pay benefit whether they signed releases or not. Judge Hoyt assumed that all severed employees received the 60 days pay. Factually, that assumption was incorrect.

The problem regarding the 60 days pay for all severed employees may be best explained by way of example.

Fact No. 1

"All affected Employees will receive 60-days pay regardless of whether they sign releases". Employee "A" and Employee "B" have 10 years of service.

Employee "A"	Employee "B"
"A" will not sign a release.	"B" will sign a release.
"A" is entitled to 60 days pay.	"B" is entitled to 60 days pay.

*Assuming that 60 days pay equals $6,000.00:

"A" gets $6,000.00	"B" gets $6,000.00

Fact No. 2

"In order to get enhanced severance benefits, the Employee must sign the release and not revoke it and send it back to the company within 45 days".

"A" does not sign the release.	"B" signs, does not revoke and sends the release back timely.
"A" does not receive severance pay.	"B" gets severance pay equal to 3 weeks for each year of service up to a maximum of 52 weeks.

10 years x 3 weeks= 30 weeks of severance pay.

"A"'s total = $6,000.00 (60-days pay)	"B"'s total= $6,000.00 (60-days pay) *plus* 30 weeks of severance pay

*no severance pay

The false issue raised by the Company was about *how* the 30 weeks of severance pay would be paid. How "B" would be paid is not the issue. "B" is arguing about the *amount* to be paid. "B" received the 30 weeks pay but not the 60 days pay that "A" received. "B" is arguing for the $6,000.00 that "A" received. The Company paid "B" the 30 weeks by giving him 8 weeks + 22 weeks and called the 8 weeks his "60 days pay". "B" then received the balance of the 30 weeks in a lump sum. "B" never received the 60 days pay that "A" received.

When Fact No. 1 and Fact No. 2 are applied to the case at bar, twenty-one (21) separated employees received a

free 60-days pay. Nine hundred and forty (940) employees received the proper number of weeks of severance pay but *did not* receive the 60-days pay that the 21 received. Although the 60 days pay benefit has nothing to do with the release issue, HL&P has confused its method of paying severance benefits with its pre-existing obligation to pay 60 days pay separate and apart from the severance offers. All 961 severed employees should have received 60 days pay regardless of whether they signed releases or not. The method of pay-out of severance pay to those who signed releases is immaterial.

ERISA Violation

Houston Industries' severance plan violated ERISA in that similarly situated employees were treated differently by the Company's formula that was utilized to calculate severance pay. Each employee accepting the severance offer would receive 3 weeks pay for each year of service with a minimum of 12 weeks and a maximum of 52 weeks. The formula penalizes those employees with 18 years or more of service while rewarding those employees with 3 years or less of service. For example, an Employee with 20 years of service should receive 60 weeks of severance pay, but received 52 weeks because 52 weeks was the maximum amount. Conversely, an Employee with 3 years of service should receive 9 weeks of severance pay, but received 12 weeks because 12 weeks pay was the minimum amount. Under ERISA, the Company had a duty to treat similarly situated employees similarly in terms of the Severance Pay Plans offered in exchange for the releases. *Jones v. AT&T Co.*, 798 F. Supp. 1137, 1145 (E.D. Pa.) (stating that ERISA required that the employer treat similarly situated employees similarly with respect to offer of severance benefits), aff'd mem., 981 F.2d 1247 (3d Cir. 1992).

CONCLUSION

The judgment of the Courts below should be reversed and rendered.

Respectfully submitted,

MARK T. McDONALD
2646 South Loop West,Suite 370
Houston, Texas 77054
(713) 667-4141
(713) 667-8029 (FAX)

Of Counsel:
JULIUS J. LARRY, III
1834 Southmore Blvd.
Houston, Texas 77004
(713) 942-0320
(713) 942-0401 (FAX)

APPENDIX A

Appeal from the United States
District Court for the
Southern District of Texas

(CA-H-92-3239)

Before WISDOM, REYNALDO GARZA and GARWOOD, Circuit Judges.*

PER CURIAM:

Having considered the briefs and arguments of counsel and the relevant portions of the record, this Court is convinced that the district court's judgment is correct, essentially for the reasons given by the district court. Defendants' summary judgment evidence showed that the releases were valid and in accordance with the law, and plaintiffs produced no summary judgment evidence to support a contrary finding. The record refutes the contention that plaintiffs were not allowed forty-five days in which to consider the releases before signing them. Under *Delaware State College v. Ricks*, 101 S.Ct. 498, 504 (1980) plaintiffs' argument that they were releasing claims arising after the date of the releases is without merit. Plaintiffs' conclusory

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

affidavits did not suffice to raise fact issues. *See Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). Moreover, plaintiffs failed to tender back any of the consideration received for the releases. *See Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991); *Wamsley v. Champlin Ref. & Chem, Inc.*, 11 F.3d 534 (5th Cir. 1993); *Wittorf v. Shell Oil Co.*, 37 F.3d 1151, 1154 (5th Cir. 1994).

Under all the circumstances, we find no abuse of the district court's discretion in its denial of plaintiffs' motion for leave to amend, which was filed after the defendants' motion for summary judgment. The judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BARBARA NORTON, ET AL	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	**CIVIL ACTION**
	§	**NO. H-92-3239**
HOUSTON INDUSTRIES	§	
INCORPORATED, ET AL.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court are the plaintiffs' motions for class certification, to dismiss, for judgment on the pleadings, and for summary judgment (instrument #49). Also pending are the defendants' cross-motion for summary judgment, (instrument #59, #60), an additional cross-motion by the plaintiffs (instrument #64); and the parties' responses, supplemental responses, replies and surreplies (instruments #58, #60, #64, #65, #67, #69) to each of the other's motions. The plaintiffs have also moved to file a supplemental complaint, which the defendants opposes (instruments #62, #70).

The plaintiffs brought claims in four separate lawsuits. In *Anzaldua, et. al. v. McKinsey & Co., et. al.*, No. 93-0400, the plaintiffs assert state law claims. That suit

was removed from state court to the Federal Court. In *Fuentez, et. al. v. Houston Indus., Inc. et. al.*, No. 92-2728, the plaintiffs claim a violation of the Worker Adjustment and Retraining Notification Act and in *Pace, et. al. v. Houston Indus. Inc., et. al.*, No. 93-0430, the plaintiffs asserted claims under the Employee Retirement Income Security Act and Age Discrimination in Employment Act.

In the interest of judicial economy, the Court has consolidated these cases for the purpose of determining the issue of the effect the signing of releases by various employees has, if any, on the causes of action asserted in the various lawsuits. Except for Cause No. H-92-2728, the cases are otherwise consolidated into this case for all purposes.

FACTUAL BACKGROUND

Houston Lighting and Power Company ("HL&P") and Utility Fuels, Inc. ("UFI"), wholly owned subsidiaries of Houston Industries, Incorporated ("HII"), terminated approximately 1100 employees in June of 1992. The plaintiffs are some of the terminated employees. HII administers the companies employee retirement plan and is therefore, a party to this litigation.

In January of 1992, prior to an April notification of termination, HL&P issued a one-page announcement stating the following:

> Under the severance plan, the Company will provide separated employees compensation equal to 3 weeks of salary per year of service with a minimum of 12 weeks pay and a 52 week maximum. The first 60 days, separated employees will continue to be paid

and receive benefits as if they were still employed. Then, they will receive a lump sum payment for the balance.

On or before April 5, HL&P supervisors notified 960 employees of their severance and gave each a severance package. The package contained a letter from HL&P stating that full salary and benefits would continue for 60 days, and that the employees could participate in a severance plan if they timely executed a release waiving claims against the company. The letter further informed employees that they would receive the release and pay plan by mail during the week of April 13. The package also contained a 27-page Success Through Excellence in Performance brochure, describing severance benefits.

As announced, during the week of April 13, HL&P mailed each targeted employee the pay plan package. A letter from the company president accompanying the package stated in bold face type in relevant part:

> **To accept the severance Pay Plan Offer, you must sign the enclosed Agreement and Release and return it to HL&P Employee Benefits ... within 45 days of receipt of this package. You may revoke your Agreement and Release within 7 days after signing it, but if you revoke it, you will lose your rights to Severance Pay Plan benefits.**

Concurrently, UFI targeted 49 individuals for severance and they were provided a similar, if not identical severance benefits package. The package contained a severance benefits brochure and a letter similar to that supplied to the HL&P employees.

Most, but not all of the HL&P and UFI targeted employees signed the "Agreement and Release". The release, which allows seven days for revocation states, in part:

> In exchange for the Company's payment to me of the severance benefits, I agree not to sue, and I waive all claims and release the Company -- from liability and damages related in any way to my employment with or separation from the Company or its affiliates. This waiver and release includes, but is not limited to, claims and causes of action under Title VII of the Civil Rights Act of 1964, as amended; the Civil Rights Act of 1991; the Age Discrimination in Employment Act of 1967, as amended, the Civil Rights Act of 1866, the Texas Commission on Human Rights Act; the Americans with Disabilities Act; the Older Workers Benefit Protection Act of 1990; the Employee Retirement Income Security Act of 1974, as amended (except as it relates to employee benefit plans qualified under Section 401(a) of the Internal Revenue Code of 1986); the Worker Adjustment and Retraining Notification Act; all state and federal statutes and regulations; all oral or written contract rights; and the common law, such as tort or personal injury of any sort.

The 60-days pay benefit that had been announced in January was mentioned in the severance benefit brochures and states:

> During the 60-day severance notification period, you will receive your regular pay and benefits. As soon as possible after the end your severance notification period, you will receive a severance pay benefit in a lump sum cash payment, provided the Company

receives your signed Agreement and Release within the required 45 days and you do not revoke it during the 7-day notification period.

The calculation for the additional lump sum payment beyond the 60-days pay was also contained in the brochures and plans. In essence, an employee would receive a minimum of four weeks pay for one year of service up to a maximum of 44 weeks pay for 18 years or more of service. All severed individuals received the 60-days pay benefit whether they signed a release or not.

PLAINTIFF'S CONTENTIONS

The plaintiffs allege that the defendants concocted a scheme to cut costs and medical benefits by laying off older employees, employees who were injured or had ill family members, and others perceived as troublemakers. In addition, the plaintiffs claim that the 60-days pay benefit is in addition to the 60-days full salary and benefits, that is paid to all severed employees. The plaintiffs assert that the defendants deducted the additional 60-days benefit before paying the lump sum benefit, thus, violating a term of the severance package.

In their motion for summary judgment, the plaintiffs list eight reasons that the "Agreement and Release" is not valid. They state that the release: (1) does not contain an offer; (2) fails to specify the amount of consideration; (3) is not signed by the party to be charged; (4) is indefinite because (a) the amount of consideration is not specified, (b) it is not signed by the defendants, and (c) essential terms are not within the four corners; (5) is invalid because the defendants failed to explain the terms of offer, and the terms, conditions, method and manner of acceptance; (6) is ambiguous and should be construed against the drafter; (7)

violates the parol evidence rule by referring to other documents and by containing indefinite essential terms; and (8) is unconscionable because of disparity in bargaining power.

In addition to the argument that the release is invalid, the plaintiffs argue that the release does not waive an ADA action because to do so violates the Old Worker's Benefit Protection Act ("OWBPA"). The plaintiffs assert that the release attempts to waive rights arising after its execution, because the plaintiffs' action relates to the termination of the employment relationship on June 5, 1992. The plaintiffs also argue that the release violates the OWBPA because the employees did not have the required 45 days to consider it before signing.

The defendants respond that the employees' rights accrued when they were notified on or about April 6, 1992, of their June 5th termination date. The defendants also contend that the release is definite. They assert that it contains an identifiable offer, states its intent, does not need to state a precise dollar amount, and may refer to other documents. The defendants also argue that their signature is not required to establish a contract and that they had no duty to explain the terms of the offer to the employees. The defendants maintain that any disparity in bargaining power does not mean that the release is unconscionable. Moreover, they argue, by signing the release the plaintiffs ratified it.

In the defendants' cross-motion for summary judgment, the defendants contend that the plaintiffs knowingly and voluntarily waived their federal law claims under the "totality of the circumstances" test because: (1) the release is simple and comprehensible in light of the plaintiffs' education and business experience; (2) the plaintiffs had ample time--at least forty-five days-to consider

the release; (3) the plaintiffs were similarly treated because individual treatment was impractical, and the plaintiffs exclusion from deciding the terms of the release is not dispositive; (4) the release was written simple and clear; (5) the release advised the plaintiffs to consult with an attorney; and (6) the plaintiffs received additional consideration beyond that which they were entitled for agreeing to the release.

Finally, the plaintiffs seek to dismiss the defendants' counterclaim and affirmative defense of waiver and release under Fed.R.Civ.Proc. 12(b)(6) and alternatively for judgment on the pleadings under Fed.R.Civ.Proc. 12(c).

The plaintiffs requested certification as a class action, and because some of the plaintiffs belong to bargaining units represented by the Union and have filed grievances to determine if the company's termination procedure violated the collective bargaining agreement, the Union was sued. The Union seeks summary judgment contending that the validity of the release should be determined by an arbitrator in the individual employee grievance procedures. Alternatively, and if the release is held to be valid and enforceable, the claims of the employees against the Union should be dismissed as moot.

AUTHORITIES AND DISCUSSION

Federal Rule of Civil Procedure 56(c) provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In determining whether the movant has met this burden, the Court should consider the

evidence and the inferences in the light most favorable to the nonmovant. *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982).

Despite the parties' numerous filings and contentions, the issues are simple and require the Court to determine the validity and enforceability of the releases. These issues will be addressed in turn.

I. VALIDITY

In the Court's opinion, the plaintiffs' several arguments that the release is not valid, fail. First, the release contains an offer. Its first sentence states, "In its offer letter to me, [the Company] offered to pay me ...." The second sentence states, "I choose to accept this offer." Thus, the lack of offer argument is unmeritorious.

The plaintiffs next argue lack of consideration. There is consideration. The release refers to the consideration as "the severance benefits as described in the HII Severance Pay Plan, as effective March 30, 1992 through June 30, 1992." Texas law does not require that the specific dollar amount be stated. See *Penwell v. Barrett*, 724 S.W.2d 902, 905 (Tex. App.--San Antonio 1987, no writ). It is not a mystery, though, what each employee will receive. Nevertheless, the contract required the plaintiffs to forego legal claims in exchange for the severance package.

The plaintiffs also argue that the defendants did not sign the contracts. This is a false issue because only the party charged with accepting the offer must sign to effectuate the contract. See *Clegg v. Brannan*, 234 S.W. 1076 (Tex. 1921). In the Court's opinion, the absence of the defendants'

signature is of no consequence in determining the issue of validity.

The plaintiffs argue as well that the release is not definite. The plaintiffs are also incorrect on the point. The release specifically refers to the letter describing the HII Severance Pay Plan. The terms of the letter are incorporated or subsumed by the agreement. See *MTrust Corp. N.A. v. LJH Corp.*, 837 S.W.2d 250 (Tex. App.--Fort Worth 1992, writ denied).

As a fifth argument, the plaintiffs assert that the defendants had a duty to explain the term of the offer, or the terms, conditions, and method of acceptance. The release states, "I choose to accept this offer, " "I understand that signing this Agreement and Release is an important legal act", and "I acknowledge that the Company has advised me to consult an attorney before signing this Agreement and Release." The release provided a line for a signature and a date signifying acceptance. This is enough.

The plaintiffs' argument that ambiguities should be construed against the defendants is irrelevant. First, the plaintiffs do not state what ambiguities exist. Nevertheless, in this Court's opinion, the release is unambiguous as a matter of law. See *Derr Constr. Co. v. City of Houston*, 846 S.W.2d 854, 862 (Tex. App.--Houston [14th Dist.] 1992, no writ).

The plaintiffs next argue that the parol evidence rule is violated by reference to other documents. The other document referred to is the letter from HII, wherein the defendants offered to pay severance benefits as described in the HII Severance Pay Plan. Under the doctrine of incorporation by reference, the letter and the pay plan

became part of the release agreement when the release was signed by the plaintiffs. *MTrust Corp.*, 837 S.W.2d at 253-54.

Finally, the plaintiffs argue that the disparity in bargaining power make the release unconscionable. See *Southwestern Bell Tel. Co. v. Delanney*, 809 S.W.2d 493, 498 (Tex. 1991)(J. Gonzalez, concurring). Unconscionability raises an issue of enforceability, not validity. Therefore, even though the release terms were non-negotiable, the plaintiffs were not forced to accept its terms. To the contrary, the plaintiffs knew what they were getting--severance benefits in exchange for release of any claims against the defendants. The Court finds that the release is not rendered invalid based on unconscionability.

Having determined the issue of validity, the Court now turns to the issue of enforceability.

II. ENFORCEABILITY

Federal Law Claims:

In the Court's opinion, a release is enforceable where the parties agree to its terms knowingly and voluntarily. The factors determining a knowing and voluntary waiver depend on the type of claim to be waived. The plaintiffs have alleged various federal and state law claims and the Court shall address each.

The plaintiffs incorrectly argue that ordinary contract principles govern the enforceability of a release involving ADA claims. The Fifth Circuit has utilized the "totality of the circumstances" test in determining whether a waiver was made knowingly and voluntarily. *O'Hare v. Global Natural*

Resources, Inc., 898 F.2d 1015, 1017 (5th Cir. 1990). Those factors are:

> (1) The plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the agreement before signing it; (3) the role of the plaintiff in deciding the terms of the agreement; (4) the clarity of the agreement; (5) whether the plaintiff was represented by or consulted with an attorney; and (6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract of law.

O'Hare, 898 F.2d at 1017. After the "totality of the circumstances" test was pronounced, the Older Worker's Benefit Protection Act amended the ADA and prescribes minimum requirements for a waiver. In the Court's opinion, the totality of the circumstances test is subsumed by the more stringent requirements of the OWBPA. Therefore, if the release satisfies the OWBPA, it satisfies the ADA totality of the circumstances test. The OWBPA states:

* * *

> (f) **Waiver**
>
> (1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--
>
> > (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be

understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual is already entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement.

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

> (H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--
>
> > (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
> >
> > (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

29 U.S.C.A. § 626(f) (West Supp. 1993).

The plaintiffs contend that the release violates subsection (f)(1)(C) by attempting to cause the plaintiffs to waive claims arising after the termination of their employee relationship on June 5, 1992. The undisputed evidence shows that the employees were notified by April 6 that their employment relationship would terminate on June 5 and that the releases were signed between April 14 and May 30. In the Court's opinion, the release does not attempt to waive any claims that might arise after the execution date. As the defendants assert, any cause of action relating to the

employees' discharge arose when the employee was notified of the discharge on April 6, 1992, not the termination date June 5, 1992. See *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981). However, at the latest, the causes of action, if any, arose seven days after the releases were signed. Specifically, the causes of action asserted here arose within the term of the employment.

The plaintiffs also argue that subsection (f)(1)(F)(ii) was violated because, whether the defendants allowed the employees 45 days to consider the release is a fact issue. The plaintiffs assert that the defendants sent the release amidst stacks of other documents, spread rumors that benefits would be lost if not signed immediately, and told them that the tax consequences were grave if the release was not signed by April 15. The plaintiffs also argue that the 45-day period should have been a term contained within the release document.

Subsection (f)(1)(F)(ii) requires that an individual be given "at least 45 days *within which* to consider the agreement." (emphasis added). Both the UFI and HL&P employees received a letter and a release information sheet stating in conspicuous boldface type, that the release must be accepted and returned within 45 days to be effective. The UFI employees received the letter and information sheet when they were notified of their severance and the HL&P employees received the notice by mail on or about April 13. The latest date that an individual returned a release was May 30. In the Court's opinion the plaintiffs not only received the required notice but also had the required time within which to consider the release before the operative time wall, June 5.

The plaintiffs next contend that fact issues exist as to: (a) the plaintiffs' role in deciding the release's terms; (b) the

release's clarity; (c) the plaintiffs' education and business experience, and whether the plaintiffs' consulted with an attorney prior to signing the release. These arguments fail to raise any fact issues. Although the plaintiffs played no role in deciding the terms of the severance plan; they, nevertheless, knew that they had a choice to participating or not. They also knew that by signing the release, they were waiving numerous causes of action.

On the question of clarity, the release is a one-page document, printed in normal size type, and conspicuously entitled "Agreement and Release." It states several times throughout that the employee is waiving claims against the defendants for both liability and damages. The release lists specific statutory laws that are waived, both state and federal statutes and regulations and common law contract and tort claims. The release refers to the HII Severance Pay Plan and outlines the benefits to be received if a release is timely executed. Finally, the pay plan presents the terms of the severance benefits in an organized fashion. Both severance brochures state in boldface type that, if there is any conflict in terms, the HII Severance Pay Plan governs. Clarity is not an issue here.

Despite the plaintiffs' contention that the defendants have not produced any evidence of their education and business experience, the Court finds that the release is written in a manner to be understood by the average individual eligible to participate in the severance benefit plan, as required by subsection (f)(1)(A). Assuming that any individual could not understand the particularities of the release, the document's language places such emphasis on the release that an individual cannot in good faith say that adequate notice was not provided. The Court finds that the plaintiffs did not blindly sign the release. Moreover, the

release states that it is an "important legal act" and advises the plaintiffs to consult an attorney before signing.

Therefore, the Court finds that the defendants complied with the OWBPA, and that the release waives the plaintiffs' ADA claims as well as the remainder of the plaintiffs' federal law claims.

State Law Claims:

The plaintiffs' state law claims are for breach of contract, fraud, misrepresentation, conversion, and intentional infliction of emotional distress. Under Texas law, a release is treated like a contract. See *Williams v. Gash*, 789 S.W.2d 261, 264 (Tex. 1990). As discussed previously, a release is a valid enforceable contract and may waive various state law claims. However, a release is subject to defenses just as any other contract. *Williams*, 789 S.W.2d at 264. The plaintiffs' petition raises the defenses of fraud and misrepresentation.

Under state and federal law, fraud is a defense that must be plead with particularity. See *Tobbon v. State Farm Mut. Auto Ins. Co.*,616 S.W.2d 243, 245 (Tex. Civ. App.--San Antonio 1981, 1981, writ ref'd, n.r.e.). The charging party has the burden of proving that a material misrepresentation was made, that is false when made, or made with reckless disregard for the truth, and as a positive assertion, made with the intention that it be acted upon, is relied upon, and injury is suffered. *Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 185 (Tex. 1977).

In their original petition, the plaintiffs contend that the defendants made "numerous misrepresentations and fraudulent inducements surrounding the plaintiffs' lay-off. These misrepresentations as alleged, included statements that

the defendants were losing money and that downsizing was necessary when in fact the Company actually made gains. The petition alleges that the defendants "developed a fraudulent scheme" to circumvent the employee evaluation system, and that supervisors "arbitrarily and capriciously" assigned employees points, thus, manipulating the employee's assessment. The plaintiffs also claim that the defendants hired other persons for the same positions for which the lay-offs occurred. Finally, the plaintiffs assert that the defendants through fraud and deceit, willfully refused to comply with federal law; i.e. to give a 60-day notice that the employee would be laid off, and represented that they would receive a 60-day pay benefit in addition to three weeks for each year of service.

Taking the plaintiffs' allegations as true, the representations fail to state a cause of action that has any nexus to the claims arising out of the signing of the releases. Whether it is true that the defendants did not need to reduce the work force, arbitrarily ranked employees for dismissal, hired other persons to replace them, or did not give a proper 60-day notice, no relevance is attached concerning the offer and its terms. Moreover, the representations that the defendants made relevant to inducing the plaintiffs to sign the release, were not false. The defendants' January announcement stated that a severed employee was to receive

> ---compensation equal to 3 weeks of salary per year of service with a minimum of 12 weeks pay and a 52 week maximum. The first 60 days, separated employees will continue to be paid and receive benefits as if they were still employed. Then, they will receive a lump sum payment for the balance.

All severed employees received the 60 days continuous pay irrespective of the lump sum pay that was

tied to the release. The fact that the 60-day pay benefit is not included in the HII Severance Pay Plan is unimportant because the pay period began April 1, 1992. The HII severance pay plan applied to all targeted employees while the lump sum pay plan applied only to targeted participating employees.

While it may be argued that the announcement misrepresents how the benefits were to be distributed, no severed employee suffered injury because each received the promised benefits. The participating individuals received a lump sum payment of at least four weeks pay in addition to the 60 days continuous pay.

The plaintiffs contend, however, that the 60-days pay was deducted from the lump sum benefit. This is not so. According to the pay plan, the plaintiffs who signed releases would received the 60-days pay between the notification and the termination date, and also received a lump sum benefit of at least four weeks pay. This procedure, if followed, is in compliance with the contract.

The plaintiffs have moved to supplement their complaint to add defenses of economic duress, estoppel, unconscionability, and in the alternative, mutual mistake.[1] In their motion, the plaintiffs do not allege any supporting facts, but merely list the causes in a single paragraph. The plaintiffs also have cross-moved for summary judgment on these claims, albeit prematurely. Because these claims arise out of the same nucleus of facts as the plaintiffs' other claims and raise no causes of action not covered by the release, the Court denies the motion to amend.

---

[1] The proposed supplemental complaint also added a cause of action for negligence. This action would be moot if leave were granted because it is also waived by the release.

The plaintiffs have sought class certification. This request is moot because the plaintiffs who did not sign the releases and the plaintiffs who revoked the release agreement within the seven-day period, have not waived their causes of actions against the defendants. Each may amend their causes of action in this case or in Cause number H-92-2728. These parties have 30 days from the entry of this Order to amend their pleadings, accordingly.

The Court DENIES the plaintiffs' motions for summary judgment, dismissal, for judgment on the pleadings, and for cross-summary judgment. The Court GRANTS the defendants' motion for summary judgment. The Union's motion to dismiss is Granted. The remaining plaintiffs are ORDERED to amend their pleadings within 30 days and plead any causes of action that remains either in this cause or cause number H-92-2728.

Finally, Cause Number H-92-2728, is returned to Judge Melinda Harmon's docket. Cause Number 93-0430 and 93-0400 are administratively closed, the claims and parties in those suits having been merged in this cause.

Any motion not addressed in this order is Denied.

It is so ORDERED.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

APPENDIX C

STATE OF TEXAS
COUNTY OF HARRIS

AFFIDAVIT IN SUPPORT OF MY LETTER OF REVOCATION

Before me the undersigned Notary Public, personally appeared Paulette D. Gadison known to me as the person making this Affidavit and after having been duly sworn, deposed and testified as follows:

"My name is Paulette D. Gadison. I am over the age of twenty-one years, of sound mind and willingly and knowingly make this Affidavit. When Houston Lighting and Power Company (HL & P) made the "offer" of severance pay in exchange for me giving up my constitutional rights, I did not know that HL & P was perpetrating a fraud against me. I thought that HL & P had lost millions of dollars and that was why we were all being laid off. It was not until after I was laid off that I found out that HL & P had its best year ever! The company actually made $448.3 million dollars.

"I was so traumatized and in shock after finding out that I was one of the people to be laid off, I could not have knowingly, willingly and voluntarily, signed away all of my constitutional rights. I did not know what rights were included in all of the items mentioned in the waiver. No person at HL & P explained anything to me. So, I reluctantly signed the waiver for fear I would not receive any of my benefits.

"Later on, I discovered that HL & P had cheated me out of eight (8) weeks of severance pay. HL & P told us

that we would get three (3) weeks pay for each year we worked at the company, up to fifty-two (52) weeks. When I received my severance check, it was eight (8) weeks short.

"I learned that HL & P had taken eight (8) weeks from my severance pay to pay me for the sixty (60) days the company promised to pay me. I, literally, paid myself for sixty (60) days. This is fraud and misrepresentation. I chose to rescind the severance contract because of HL & P's material breach.

"Also, I learned that HL & P was supposed to give me sixty (60) days notice that I, specifically, was one of the persons affected by the lay-off. HL & P never told me specifically that I was being laid off until April 6, 1992. I was shocked, angry, stunned, pissed-off, and dumbfounded. I could not believe it! I was handed an unmarked white envelope and told "goodbye". HL & P told us we would be kept on the company rolls for sixty (60) days, as if we were employees. I was not an employee of HL & P after April 6, 1992. I could not have gone back to my previous position at HL & P after April 6, 1992. The company took my identification badge.

"After I learned of the fraudulent activities of HL & P, I immediately sent a letter revoking acceptance of the severance offer. I also rejected the lay-off as not having an economic basis. Mr. Don D. Jordan, Chairman, received my letter and so did the Secretary of Benefits. I rescinded the contract. I want damages from HL & P. They have ruined my life and my career. I am too old for entry-level jobs.

"I recently learned that the severance contract had an illegal purpose - to mask unlawful discrimination based on race, age, sex, national origin, and religion. HL & P, in

conspiracy with other companies, decided to "purge" HL & P of minorities hired as a result of affirmative action.

Further Affidavit Sayeth Not

/s/ Paulette D. Gadison
SIGNATURE

SWORN TO AND SUBSCRIBED, this 15th day of August, 1992, before me the undersigned Notary Public. Witnesseth My Hand and Seal of Office.

Rachel E. Analdua
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

11-26-94
MY COMMISSION EXPIRES

APPENDIX D

HOUSTON INDUSTRIES
INCORPORATED

December 17, 1992

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED
P 143 694 211

Mr. Edward Finister
8110 Arrowhead
Houston, Texas 77075

Dear Mr. Finister:

After your hearing before the Compensation and Benefits Committee on November 16, 1992, the Committee has considered the information presented by you with respect to your revocation of the Agreement and Release previously executed under the terms of the Houston Industries Incorporated Severance Pay Plan. Not finding any evidence to support a revocation within the seven (7) day period allowed by the Severance Pay Plan, we must deny your attempted revocation of the Agreement and Release.

Sincerely,
/s/ E.P. Weylandt
E.P. Weylandt
Secretary
Compensation and Benefits Committee

EPW:mr